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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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DOUGLAS G. TWEEDY,

Plaintiff,

v.

NANCY A. BERRYHILL,<sup>1</sup> Commissioner of  
Social Security,

Defendant.

Case No. 2:19-cv-00853-DJA

**ORDER**

13        This matter involves the review of an administrative action by the Commissioner of Social  
14        Security (“Commissioner”) denying Plaintiff Douglas G. Tweedy’s (“Plaintiff”) applications for  
15        disability insurance benefits under Title II of the Social Security Act, disabled widower’s benefits  
16        (DWB) under Title II of the Act, and supplemental security income under Title XVI of the Act.  
17        The Court has reviewed Plaintiff’s Motion for Reversal or to Remand (ECF No. 18), filed on  
18        October 17, 2019, and the Commissioner’s Response and Cross-Motion to Affirm (ECF Nos. 23-  
19        24), filed on December 18, 2019. Plaintiff filed a Reply (ECF No. 25) on January 7, 2020.

20        **I.        BACKGROUND**

21                **1.        Procedural History**

22        On October 6, 2015, Plaintiff applied for disability insurance benefits, disabled widower’s  
23        benefits, and supplemental security income, alleging an onset date of January 1, 2011. AR<sup>2</sup> 276-  
24        96. Plaintiff’s claims were denied initially, and on reconsideration. AR 149-51 and 192-94. A  
25        hearing was held before an Administrative Law Judge (“ALJ”) on January 8, 2018. AR 66-109.

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27        <sup>1</sup> Andrew Saul is now the Commissioner of Social Security and substituted as a party.

28        <sup>2</sup> AR refers to the Administrative Record in this matter. (Notice of Manual Filing (ECF No. 14).)

1 On June 6, 2018, the ALJ issued a decision denying Plaintiff's claim. AR 16-36. The ALJ's  
2 decision became the Commissioner's final decision when the Appeals Council finally denied  
3 review, on March 18, 2018. AR 1-6. On May 20, 2019 Plaintiff commenced this action for  
4 judicial review under 42 U.S.C. §§ 405(g). (*See* Motion/Application for Leave to Proceed *in*  
5 *forma pauperis*. (ECF No. 1).)

## 6 **2. The ALJ Decision**

7 The ALJ followed the five-step sequential evaluation process set forth in 20 C.F.R. §§  
8 404.1520, 416.920.<sup>3</sup> AR 22-31. At step one, the ALJ found that Plaintiff had not engaged in  
9 substantial gainful activity from the alleged onset date of January 1, 2011 through the date of the  
10 decision. AR 22. At step two, the ALJ found that Plaintiff had medically determinable "severe"  
11 impairments of diabetes mellitus, type I with neuropathy and asthma. *Id.* He also found  
12 Plaintiff's history of colitis and related iron deficiency anemia to be non-severe, but even if he  
13 alternatively found it severe and added a work limitation of ready access to a bathroom, then he  
14 would deny at step five. *Id.*

15 At step three, the ALJ found that Plaintiff did not have an impairment or combination of  
16 impairments that met or medically equaled a listed impairment in 20 C.F.R. Part 404, Subpart P,  
17 Appendix 1. *Id.* at 23. At step four, the ALJ found that Plaintiff has the residual functional  
18 capacity to perform medium work as defined in 20 CFR 404.1567(c) and 416.967(c) except that  
19 he is limited to frequent climbing, balancing, stooping, kneeling, and crouching and occasional  
20 crawling, avoid concentrated exposure to heat and cold as well as chemicals and pulmonary  
21 irritants such as fumes, odors, dust, gases, smoke and poorly ventilated areas, requires a sit/stand  
22 option meaning that he could work while sitting or standing, alternating between the two  
23 positions with the time in either position and the frequency of position change at his sole  
24 discretion. *Id.*

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28 <sup>3</sup> The regulations relevant to Title II and Title XVI claims are almost identical; the Court will only  
cite Title II regulations for the remainder of this Order.

1 The ALJ found that Plaintiff is not capable of performing any past relevant work. AR 29.  
2 At step five, the ALJ found Plaintiff to be a younger individual age 18-49 on the alleged disability  
3 onset date with a subsequent change to closely approaching advanced age, limited education, able  
4 to communicate in English, and transferability of job skills not material, and there are jobs that  
5 exist in significant numbers in the national economy that he can perform. *Id.* at 29-30. The ALJ  
6 considered the Medical-Vocational Rules 203.26 and 203.19 along with the erosion of the  
7 unskilled medium occupational base due to the additional RFC limitations and relied on  
8 vocational expert testimony to find the following jobs were capable of being performed: office  
9 helper, information clerk, and hand packager. *Id.* at 30. Accordingly, the ALJ concluded that  
10 Plaintiff was not under a disability at any time from January 1, 2011 through the date of the  
11 decision. *Id.* at 31.

## 12 **II. DISCUSSION**

### 13 **1. Standard of Review**

14 Administrative decisions in social security disability benefits cases are reviewed under 42  
15 U.S.C. § 405(g). *See Akopyan v. Barnhart*, 296 F.3d 852, 854 (9th Cir. 2002). Section 405(g)  
16 states: “Any individual, after any final decision of the Commissioner of Social Security made  
17 after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a  
18 review of such decision by a civil action . . . brought in the district court of the United States for  
19 the judicial district in which the plaintiff resides.” The court may enter “upon the pleadings and  
20 transcripts of the record, a judgment affirming, modifying, or reversing the decision of the  
21 Commissioner of Social Security, with or without remanding the cause for a rehearing.” *Id.* The  
22 Ninth Circuit reviews a decision affirming, modifying, or reversing a decision of the  
23 Commissioner de novo. *See Batson v. Comm’r*, 359 F.3d 1190, 1193 (9th Cir. 2004).

24 The Commissioner’s findings of fact are conclusive if supported by substantial evidence.  
25 *See* 42 U.S.C. § 405(g); *Ukolov v. Barnhart*, 420 F.3d 1002 (9th Cir. 2005). However, the  
26 Commissioner’s findings may be set aside if they are based on legal error or not supported by  
27 substantial evidence. *See Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1052 (9th Cir.  
28 2006); *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). The Ninth Circuit defines

1 substantial evidence as “more than a mere scintilla but less than a preponderance; it is such  
2 relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”  
3 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995); *see also Bayliss v. Barnhart*, 427 F.3d  
4 1211, 1214 n.1 (9th Cir. 2005). In determining whether the Commissioner’s findings are  
5 supported by substantial evidence, the court “must review the administrative record as a whole,  
6 weighing both the evidence that supports and the evidence that detracts from the Commissioner’s  
7 conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *see also Smolen v. Chater*, 80  
8 F.3d 1273, 1279 (9th Cir. 1996).

9 Under the substantial evidence test, findings must be upheld if supported by inferences  
10 reasonably drawn from the record. *Batson*, 359 F.3d at 1193. When the evidence will support  
11 more than one rational interpretation, the court must defer to the Commissioner’s interpretation.  
12 *See Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005); *Flaten v. Sec’y of Health and Human*  
13 *Serv.*, 44 F.3d 1453, 1457 (9th Cir. 1995). Consequently, the issue before the court is not whether  
14 the Commissioner could reasonably have reached a different conclusion, but whether the final  
15 decision is supported by substantial evidence. It is incumbent on the ALJ to make specific  
16 findings so that the court does not speculate as to the basis of the findings when determining if the  
17 Commissioner’s decision is supported by substantial evidence. Mere cursory findings of fact  
18 without explicit statements as to what portions of the evidence were accepted or rejected are not  
19 sufficient. *Lewin v. Schweiker*, 654 F.2d 631, 634 (9th Cir. 1981). The ALJ’s findings “should  
20 be as comprehensive and analytical as feasible, and where appropriate, should include a statement  
21 of subordinate factual foundations on which the ultimate factual conclusions are based.” *Id.*

## 22 **2. Disability Evaluation Process**

23 The individual seeking disability benefits has the initial burden of proving disability.  
24 *Roberts v. Shalala*, 66 F.3d 179, 182 (9th Cir 1995). To meet this burden, the individual must  
25 demonstrate the “inability to engage in any substantial gainful activity by reason of any medically  
26 determinable physical or mental impairment which can be expected . . . to last for a continuous  
27 period of not less than 12 months.” 42 U.S.C. § 423(d)(1)(A). More specifically, the individual  
28 must provide “specific medical evidence” in support of her claim for disability. 20 C.F.R. §

1 404.1514. If the individual establishes an inability to perform her prior work, then the burden  
2 shifts to the Commissioner to show that the individual can perform other substantial gainful work  
3 that exists in the national economy. *Reddick*, 157 F.3d at 721.

4 The ALJ follows a five-step sequential evaluation process in determining whether an  
5 individual is disabled. *See* 20 C.F.R. § 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 140 (1987). If  
6 at any step the ALJ determines that he can make a finding of disability or nondisability, a  
7 determination will be made and no further evaluation is required. *See* 20 C.F.R. §  
8 404.1520(a)(4); *Barnhart v. Thomas*, 540 U.S. 20, 24 (2003). Step one requires the ALJ to  
9 determine whether the individual is engaged in substantial gainful activity (“SGA”). 20 C.F.R. §  
10 404.1520(b). SGA is defined as work activity that is both substantial and gainful; it involves  
11 doing significant physical or mental activities usually for pay or profit. *Id.* § 404.1572(a)-(b). If  
12 the individual is engaged in SGA, then a finding of not disabled is made. If the individual is not  
13 engaged in SGA, then the analysis proceeds to the step two. Step two addresses whether the  
14 individual has a medically determinable impairment that is severe or a combination of  
15 impairments that significantly limits him from performing basic work activities. *Id.* §  
16 404.1520(c). An impairment or combination of impairments is not severe when medical and  
17 other evidence establishes only a slight abnormality or a combination of slight abnormalities that  
18 would have no more than a minimal effect on the individual’s ability to work. *Id.* § 404.1521; *see*  
19 *also* Social Security Rulings (“SSRs”) 85-28, 96-3p, and 96-4p.<sup>4</sup> If the individual does not have a  
20 severe medically determinable impairment or combination of impairments, then a finding of not  
21 disabled is made. If the individual has a severe medically determinable impairment or  
22 combination of impairments, then the analysis proceeds to step three.

23 Step three requires the ALJ to determine whether the individual’s impairments or  
24 combination of impairments meet or medically equal the criteria of an impairment listed in 20

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26 <sup>4</sup> SSRs constitute the SSA’s official interpretation of the statute and regulations. *See Bray v.*  
27 *Comm’r of Soc. Sec. Admin.*, 554 F.3d 1219, 1224 (9th Cir. 2009); *see also* 20 C.F.R. § 402.35(b)(1).  
28 They are entitled to some deference as long as they are consistent with the Social Security Act and  
regulations. *Bray*, 554 F.3d at 1223 (finding ALJ erred in disregarding SSR 82-41).

1 C.F.R. Part 404, Subpart P, Appendix 1. 20 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526. If  
2 the individual's impairment or combination of impairments meet or equal the criteria of a listing  
3 and the duration requirement (20 C.F.R. § 404.1509), then a finding of disabled is made. 20  
4 C.F.R. § 404.1520(h). If the individual's impairment or combination of impairments does not  
5 meet or equal the criteria of a listing or meet the duration requirement, then the analysis proceeds  
6 to step four.

7 Before moving to step four, however, the ALJ must first determine the individual's  
8 residual functional capacity ("RFC"), which is a function-by-function assessment of the  
9 individual's ability to do physical and mental work-related activities on a sustained basis despite  
10 limitations from impairments. *See* 20 C.F.R. § 404.1520(e); *see also* SSR 96-8p. In making this  
11 finding, the ALJ must consider all the relevant evidence, such as all symptoms and the extent to  
12 which the symptoms can reasonably be accepted as consistent with the objective medical  
13 evidence and other evidence. 20 C.F.R. § 404.1529; *see also* SSRs 96-4p and 16-3p. To the  
14 extent that statements about the intensity, persistence, or functionally limiting effects of pain or  
15 other symptoms are not substantiated by objective medical evidence, the ALJ must evaluate the  
16 individual's statements based on a consideration of the entire case record. The ALJ must also  
17 consider opinion evidence in accordance with the requirements of 20 C.F.R. § 404.1527 and  
18 SSRs 96-2p, 96-5p, 96-6p, and 06-3p.

19 Step four requires the ALJ to determine whether the individual has the RFC to perform his  
20 past relevant work ("PRW"). 20 C.F.R. § 404.1520(f). PRW means work performed either as the  
21 individual actually performed it or as it is generally performed in the national economy within the  
22 last 15 years or 15 years before the date that disability must be established. In addition, the work  
23 must have lasted long enough for the individual to learn the job and performed at SGA. 20  
24 C.F.R. §§ 404.1560(b) and 404.1565. If the individual has the RFC to perform his past work,  
25 then a finding of not disabled is made. If the individual is unable to perform any PRW or does  
26 not have any PRW, then the analysis proceeds to step five.

27 The fifth and final step requires the ALJ to determine whether the individual is able to do  
28 any other work considering his RFC, age, education, and work experience. 20 C.F.R. §

1 404.1520(g). If he is able to do other work, then a finding of not disabled is made. Although the  
2 individual generally continues to have the burden of proving disability at this step, a limited  
3 burden of going forward with the evidence shifts to the Commissioner. The Commissioner is  
4 responsible for providing evidence that demonstrates that other work exists in significant numbers  
5 in the national economy that the individual can do. *Yuckert*, 482 U.S. at 141-42.

### 6 **3. Analysis**

#### 7 **a. Whether the ALJ Properly Assessed the Opinion Evidence**

8 Plaintiff contends that the ALJ failed to properly weigh the opinion of Plaintiff's treating  
9 endocrinologist, Guang T. Nguyen, D.O., and thus, the RFC is not supported by substantial  
10 evidence. (ECF No. 18). Specifically, he contends that the ALJ erred in discounting Plaintiff's  
11 reported neuropathic limitations by affording Dr. Nguyen's more restrictive opinion little weight  
12 and adopting the opinion of the non-examining State agency physician who specializes in  
13 gynecology to find that Plaintiff could perform medium work. (*Id.* at 15-19). Plaintiff also  
14 argues that the ALJ's reliance on the fact that Plaintiff failed to follow the treatment prescribed by  
15 Dr. Nguyen is misplaced given the side effects that Plaintiff suffered in managing his Type I  
16 diabetes. (*Id.* at 19-20). Finally, Plaintiff claims that the ALJ's failure to provide adequate  
17 reasons for rejecting Dr. Nguyen's opinion warrants remand or reversal because under Dr.  
18 Nguyen's recommended RFC, Plaintiff would be found disabled at step five. (*Id.* at 21).

19 The Commissioner responds that Dr. Nguyen's opinion is inconsistent with the minimal  
20 objective findings in the record, lacked any explanation to support the severe limitations assessed  
21 and contradicted by Plaintiff's good response to medication when he was compliant with the  
22 treatment prescribed. (ECF No. 23, 8-16). Plaintiff replies that the Commissioner is attempting  
23 to support the ALJ's opinion evidence assessment with reasons not included in the ALJ's  
24 explanation of the weight assigned. (ECF No. 25, 2-4). He further underscores his argument that  
25 the ALJ failed to address probative evidence in the record, cited unrelated objective evidence to  
26 discount Dr. Nguyen's opinion, failed to discuss the side effects suffered by Plaintiff, and the  
27 factors set forth in SSR 16-3p that are relevant as to why Plaintiff had difficulty managing his  
28 Type I diabetes' symptoms. (*Id.*).

1 The Court finds that ALJ's assignment of little weight to Dr. Nguyen's opinion is  
2 supported by substantial evidence. In deciding how much weight to give a medical opinion, the  
3 ALJ considers factors including, e.g., the treating or examining relationship of the opinion's  
4 source and the claimant; how well the opinion is supported; and how consistent the opinion is  
5 with the record as a whole. See 20 C.F.R. § 404.1527(c). In evaluating medical opinions, the ALJ  
6 must provide "clear and convincing" reasons supported by substantial evidence for rejecting the  
7 uncontradicted opinion of an examining physician. *Lester v. Chater*, 81 F.3d 821, 830-831 (9th  
8 Cir. 1995).

9 Here, the ALJ specifically explained that Dr. Nguyen's opinion is not proportionate and  
10 inconsistent with the objective medical findings. AR 28. For example, the ALJ noted that there  
11 were limited abnormal findings of elevated glycated hemoglobin, decreased or absent sensation in  
12 the first digit of Plaintiff's left foot and episodes of dyspnea during an upper respiratory infection,  
13 but otherwise normal findings on examination. *Id.* As such, the ALJ articulated the lack of  
14 support in the objective medical records as one reason for assigning little weight to Dr. Nguyen's  
15 opinion. The Court is not persuaded by Plaintiff's claim that the ALJ ignored probative evidence  
16 by only mentioning loss of sensation in one digit of Plaintiff's foot. He clearly provided a  
17 summary of the overall medical evidence and Plaintiff's attempt to cherry-pick some objective  
18 medical evidence does not warrant overturning the ALJ's assessment of Dr. Nguyen's opinion.

19 The ALJ also noted that Dr. Nguyen's opinion as to the more restrictive sitting,  
20 walking/standing, break, and absence limitations lacked any explanation. *See Caudhry v. Astrue*,  
21 688 F.3d 671 (9th Cir. 2012) ("The ALJ need not accept the opinion of any physician, including a  
22 treating physician, if that opinion is brief, conclusory, and inadequately supported by clinical  
23 findings.") (quoting *Bray*, 554 F.3d at 1228). The Court finds that this second reason articulated  
24 by the ALJ for assigning little weight to Dr. Nguyen's opinion is supported by substantial  
25 evidence. The ALJ is not bound to rubber stamp an opinion – even that from a treating physician  
26 and a specialist – that is conclusory and inadequately supported. *See, e.g., Thomas*, 278 F.3d at  
27 957. Although Plaintiff seeks to discount the ALJ's consideration of the non-examining State  
28 agency physician's opinion that supported the assigned RFC, the Court finds that the ALJ



1 properly considered this other opinion evidence as an indication that Dr. Nguyen's restrictions  
2 were inconsistent with the entirety of the record. Indeed, the ALJ actually assigned a more  
3 restrictive RFC than that proposed by consultative examiner Dr. Cabaluna. He also assigned  
4 some weight and little weight to the opinions from State agency medical consultants Dr.  
5 Michelson and Dr. Duong, respectively, and provided an explanation for his evaluation.

6 Further, the ALJ properly considered the fact that Plaintiff responded well to medication  
7 when he was compliant with treatment. AR 28. This does not mean that the ALJ ignored the side  
8 effects of Plaintiff's medication or difficulties in dealing with his Type I diabetes. This appears to  
9 be an attempt to conflate the ALJ's evaluation of Plaintiff's subjective testimony with the ALJ's  
10 evaluation of Dr. Nguyen's opinion. Overall, the Court finds that the ALJ's assignment of little  
11 weight to Dr. Nguyen's opinion is sufficiently explained in the decision and well-supported by  
12 the overall record such that the Court may not substitute its judgment. *See Burch*, 400 F.3d at  
13 679. Therefore, the Court concludes that the ALJ's decision is supported by substantial evidence  
14 and free from reversible legal error.

### 15 **III. CONCLUSION AND ORDER**

16 Accordingly, IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (ECF No.  
17 18) is **denied**.

18 IT IS FURTHER ORDERED that the Commissioner's Cross-Motion to Affirm (ECF No.  
19 23) is **granted**.

20 The Clerk shall enter judgment accordingly and close the case.

21 DATED: February 7, 2020

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24 DANIEL J. ALBREGTS  
25 UNITED STATES MAGISTRATE JUDGE  
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